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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1029**

Robert Norby,
Respondent,

vs.

Buffalo-Red River Watershed District, et al.,
Appellants.

**Filed March 26, 2018
Reversed and Remanded
Kalitowski, Judge***

Clay County District Court
File No. 14-CV-15-3485

Zenas Baer, Zenas Baer Law Office, Hawley, Minnesota (for respondent)

Tami Norgard, Charlotte J. Skar Rusch, Vogel Law Firm, Fargo, North Dakota (for
appellants)

Considered and decided by Schellhas, Presiding Judge; Jesson, Judge; and
Kalitowski, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellants, Buffalo-Red River Watershed District (BRRWD) and its administrator, Bruce Albright, argue that the district court erred by granting respondent Robert Norby's motion to disqualify their legal counsel under Minn. R. Prof. Conduct 3.7. We reverse and remand.

DECISION

We review a district court's decision to disqualify counsel under the rules of professional conduct for an abuse of discretion. *State v. Patterson*, 796 N.W.2d 516, 524 (Minn. App. 2011), *aff'd*, 812 N.W.2d 106 (Minn. 2012). Minn. R. Prof. Conduct 3.7(a) provides: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client." The rule recognizes that combining the roles of advocate and witness may confuse the jury and may cause prejudice to the opposing party. Minn. R. Prof. Conduct 3.7 cmts. 1-2.

Norby's underlying complaint against appellants alleges due-process violations, deprivation of property interests, and conspiracy under 42 U.S.C. § 1983. His claims arise from a BRRWD decision in 2015 approving a petition by his neighbor, which proposed to cut a drainage channel through Norby's land. Shortly before trial, Norby filed a motion in limine to disqualify appellants' trial counsel, Tami Norgard, under Rule 3.7. Norby argued that Norgard was a necessary witness on the basis of a letter she signed in 2007 advising

Norby's neighbor of BRRWD's decision to decline to pursue enforcement action against Norby regarding his dike. Norby contended that Norgard's testimony was necessary to establish his allegation that, in 2007, BRRWD considered Norby's dike-and-berm system to be legal and within his rights of reasonable use, and that in 2015, BRRWD arbitrarily changed its position when it approved his neighbor's petition. Norby's counsel admitted that he had been in possession of the 2007 letter for some time although he brought the motion to disqualify Norgard only 20 days before trial.

Norgard wrote the 2007 letter following a noticed special board meeting on the neighbor's request that BRRWD take enforcement action against Norby due to his dike-and-berm system. The letter outlined BRRWD's economic, political, and legal reasons for declining to pursue enforcement against Norby, stated that BRRWD would not "be used as a tool for private parties to direct their personal drainage agendas," and referred to a Minnesota Court of Appeals case addressing the reasonable-use surface-water rights of neighboring landowners.

The district court found that "cross examination of Ms. Norgard, the author of the September 7, 2007 letter . . . is an essential element of [Norby]'s case. [Norby] would be prejudiced by allowing Norgard, an essential witness, to remain as advocate for [BRRWD] and Bruce Albright." The district court described the 2007 letter as significant evidence that was "180 degrees from what the [BRRWD] ended up doing" and that "[Norgard], as a representative of the board, very clearly stated what the board's belief and position was."

Appellants argue that the district court abused its discretion by finding that Norgard was a necessary trial witness. We agree.

The Minnesota Supreme Court has long recognized that a motion for disqualification of counsel carries the potential for abuse. *Humphrey ex rel. State v. McLaren*, 402 N.W.2d 535, 541 (Minn. 1987) (describing a party's assertion to call opposing counsel as a witness as a "too-frequent trial tactic"). As a result, disqualification of counsel is warranted only when counsel's testimony is "necessary." *Id.* Other jurisdictions have described disqualification as "a drastic measure, to be imposed only when absolutely necessary." See Ellen J. Bennett, et al., *Annotated Model Rules of Professional Conduct* § 3.7, at 406 (8th ed. 2015) (quotations omitted); see also *State v. Miller*, 600 N.W.2d 457, 463 n.5 (Minn. 1999) (providing that Minnesota Rules of Professional Conduct were patterned after ABA Model Rules of Professional Conduct).

When counsel's testimony is "merely cumulative, or quite peripheral, or already contained in a document admissible as an exhibit," or if the evidence sought to be elicited by testimony can be produced in another effective way, the attorney-witness is ordinarily not "necessary" and disqualification is not warranted. *Humphrey*, 402 N.W.2d at 541. Testimony by counsel is not necessary when another witness can testify on the relevant issue. *State v. Fratzke*, 325 N.W.2d 10, 13 (Minn. 1982).

Disqualification of counsel is not warranted when it would impose a substantial hardship on the client. Minn. R. Prof. Conduct 3.7(a)(3). Comment 4 explains that, in determining whether disqualification would impose a substantial hardship, the district court must give due regard to the effect on counsel's client and must balance the interests of the client against the likelihood that counsel's testimony will mislead the tribunal or cause prejudice to the opposing party. Minn. R. Prof. Conduct 3.7 cmt. 4. In weighing

these interests, “[i]t is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.” *Id.*

Here, our review of the record indicates that Norgard’s 2007 letter, on which the district court based its decision to disqualify Norgard, is peripheral and of limited relevance to Norby’s trial claims arising from BRRWD’s decision eight years later. In addition, the district court failed to evaluate the necessity of Norgard’s testimony in light of any alternative evidentiary sources. The BRRWD issued its decision and letter in 2007 following a noticed special board meeting. There is no evidence that Norgard acted as a decision maker at the meeting or in a capacity other than legal counsel. To the contrary, the record indicates that BRRWD’s board members and its administrator, who is a party to this action, decided BRRWD’s course of action in 2007, directed Norgard to write the letter, and are available to offer relevant testimony on the board’s decision. Because the evidence sought to be elicited from Norgard’s testimony is peripheral to Norby’s trial claims and can be produced in other effective ways, we conclude that Norgard is not a necessary witness.

The district court also failed to give due regard to the effect that Norgard’s disqualification would have on appellants. See Minn. R. Prof. Conduct 3.7 cmt. 4. The district court did not address or analyze whether Norgard’s disqualification created a substantial hardship for appellants, when it should have balanced appellants’ interest in retaining its counsel of choice against any competing interests. See Minn. R. Prof. Conduct 3.7 cmt. 4. In addition, the district court should have considered the timeliness of Norby’s motion and whether he had a reason to foresee that Norgard would be a witness. See *id.*

Norby's admission that he had been in possession of the 2007 letter for some time and had brought the motion to disqualify appellant's counsel only 20 days before trial should have weighed against him in the district court's determination of whether it created a hardship and if disqualification was warranted.

We conclude that the district court abused its discretion by disqualifying appellants' counsel because Norgard was not a necessary witness and the district court failed to analyze whether the disqualification was warranted on the basis of the substantial hardship on appellants.

Reversed and remanded.